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IN THE

Supreme Court of the United States

October Term, 1944.

No. 928.

HESTER HINES, Administratrix of the Estate of Ivan Pearl Hines, Deceased, Et Al., - Petitioners,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX.

TABLE OF CASES CITED.

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v.

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OPINION BELOW.

The opinion of the District Court for the Western District of Virginia at Big Stone Gap will be found at pp. 1-5 of the Transcript of Record filed in this Court by petitioners on February 8, 1945, and the opinion of the United States Circuit Court of Appeals for the Fourth Circuit will be found at pp. 55-60 of said Transcript.

QUESTION PRESENTED.

Should this Court grant a writ of certiorari to review the decisions of the District Court and the Circuit Court of Appeals where there is no question of public importance or of general or federal law involved but where the decisions are rested upon the law of Virginia, where the injuries complained of occurred, and where there is no claim that said decisions are in conflict with the decisions of the highest court of Virginia, and where both courts have found that the evidence was not sufficient to justify a recovery under the law of Virginia?

STATEMENT.

All references to the Record ("R.") in this statement are to the printed Transcript of Record filed with the Clerk of this Court by petitioners on February 8, 1945.

The evidence introduced in the District Court shows that the two boys (decedents) left the home of the Hines boy at Pennington Gap between 8:00 and 8:30 P. M., July 13, 1943, to hunt frogs in a pond near Dryden; that around midnight two boys, not identified, were seen at a pond near Dryden and were making inquiry in respect to other ponds in the community; and that about daylight the next morning the mangled body of the Pritchard boy was found about 50 feet west of a grade crossing, and the mangled body of the Hines boy about 75 feet west of this grade crossing

(R. 50). This grade crossing is located about three-quarters of a mile from the pond near Dryden, and about 4 miles from Pennington Gap, where decedents lived. There is no evidence which shows the time the decedents left the pond or what they were doing at the time they were fatally injured. Assuming that the two boys who were seen at the pond about midnight were the decedents, this is the last time they were seen alive. No one testified to having seen the boys at the time they were fatally injured. Neither is there any testimony to show what they were doing at that time or their position upon the railroad track. There were signs along the railroad track which started about the second (cross) tie east of the crossing, and which extended westward "like something had been swept down over the crossing" (R. 50). Another witness said it "looked like there had been a little scuffle of some kind in the gravel" (R. 15). Blood spots, a carbide light and a stick, something like a walking cane, were found about two (cross) ties east of the crossing (R. 15, 18, 51, 52). Scraps of "something" were found in a (rail) joint "right east of the crossing, right close to the crossing" (R. 53). This evidence refutes the statement in petitioner's brief (p. 10) that the decedents were upon the crossing when struck by the train.

An examination of respondent's engine No. 1345 at 3:00 P. M., some 10 hours after decedents' mangled bodies were found, revealed hair and scraps of brains on the second brake rigging, about the middle of the engine (R. 42). That engine had been operated from Pennington Gap to Norton and return the night of

the fatal injury (R. 42), but the evidence does not show what time it passed the point where decedents' bodies were found, on either movement. The testimony of Louise Reasor (R. 32) and of her husband, Roy Reasor (R. 39, 40) show clearly that three trains passed this point between 3:00 A. M. and 5:00 A. M., two moving westward and one eastward. Roy Reasor left his home "right around five o'clock" and stopped at the point where the bodies were found between 5:30 A. M. and 6:00 A. M. (R. 37).

Wm. Trent, who was staying in the home of Robert Taylor, located some three-quarters of a mile from the crossing in question, heard only one train pass the crossing after he awoke. That train was going westward and he did not hear it signal for the crossing (R. 9). Trent at first said this train passed "something like four o'clock" (R. 10); later said it was "something near maybe four-thirty" (R. 22), and finally said it was "kinda beginning to break daylight" (R. 24). The failure of Trent to hear the other two trains which the Reasors heard is explained by reason of his having been awake only a few minutes when he heard the train regarding which he testified (R. 9).

The testimony does not show which one of the two westbound trains that passed between 3:00 A. M. and 5:00 A. M. ran over the bodies of decedents, or which of these trains was propelled by engine No. 1345. The District Court found that the evidence did not show which train struck the decedents, or any causal connection between any fact that was established by the evidence and the death of decedents. The Court further

found that the jury could only surmise as to how the injuries occurred or the time of the occurrence, or that the injuries occurred through "some negligence on the part of some employee of the railroad (respondent) in the operation of the train" (R. 3). Thereupon respondent's motion for a directed verdict in its favor was sustained, and the jury was instructed to return a verdict in favor of respondent (R. 3-5).

The Circuit Court of Appeals, applying the law of Virginia, to wit, that the burden of proof was upon petitioners; that negligence must be proved by affirmative evidence; that negligence cannot be presumed or inferred, and that a verdict cannot be found upon a mere conjecture, found that petitioners failed to carry the burden, and that there was nothing in the evidence that proves in the slightest degree any negligence on the part of the defendant railroad company (respondent). The Court also found that the evidence left the circumstances of the happenings so clouded in uncertainty that it would be impossible for a jury to say with any degree of certainty what did happen, and that the District Court was right in directing a verdict for respondent (R. 58-60). In addition to the cases cited and relied upon by the Circuit Court of Appeals (R. 58, 59), the findings of that Court are fully supported by Southern Ry. v. Hall's Admr., 102 Va. 135, 45 S. E. 867, and Southern Ry. v. Adams, 129 Va. 233, 105 S. E. 566, where the Supreme Court of Appeals of Virginia held that the party who affirms negligence must establish it; by N. & W. Ry. Co. v. Wellon's Admr., 155 Va. 218, 154 S. E. 575, where the same Court held

that in order for a plaintiff to recover it is necessary for him to prove, first, that the defendant was negligent, and, second, that this negligence contributed to the injury, and that there must be some causal connection between the negligence of the defendant and the injuries suffered by the plaintiff; and by Hawkins, *et al.*, v. Beecham, 168 Va. 553, 191 S. E. 640, where the same Court held that negligence and an accident do not make a case; that between them there must be causal connection, and that evidence tending to show causal connection must be sufficient to take the question out of the realm of mere conjecture or speculation and into the realm of legitimate inference, before a question of fact for submission to the jury has been made.

SUMMARY OF ARGUMENT.

I. The Court should not grant a writ of certiorari to review a decision of the Circuit Court of Appeals and re-examine the evidence where the issue turns entirely upon appraisal of the evidence and the reasonable inferences to be drawn from it.

II. The Court should not grant a writ of certiorari to review a decision of the Circuit Court of Appeals, which is rested upon the law of the State where the cause of action arose, and where there is no claim that the decision is in conflict with the decisions of the highest Court of that State, and where there is no question of public importance or of general or federal law involved.

ARGUMENT.

I. The Court Should Not Grant a Writ of Certiorari to Review a Decision of the Circuit Court of Appeals and Re-examine the Evidence Where the Issue Turns Entirely Upon Appraisal of the Evidence and the Reasonable Inferences to be Drawn From It.

The Court is asked to grant a writ of certiorari to review the evidence for the sole purpose of determining whether these cases should have been submitted to a jury for decision or whether the action of the District Court in directing a verdict for respondent was proper (Petition, p. 8). This merely calls for this Court to re-examine and appraise the evidence. Both the District Court and the Circuit Court of Appeals have found that the evidence was not sufficient to submit the question of respondent's negligence to the jury; that the jury could only surmise, first, as to how the injuries occurred, and, second, that the injuries occurred through the negligence of respondent. Under a well-established rule, the Court will accept this concurrent finding and will not re-examine the evidence. *Houston Oil Co. of Texas, et al.* v. *Goodrich, et al.*, 245 U. S. 440; *Spencer Kellogg & Sons, Inc.* v. *Hicks, Admx., et al.*, 285 U. S. 502; *United States* v. *O'Donnell, et al.*, 303 U. S. 501.

Neither will the Court grant a writ of certiorari merely to give petitioners another hearing. *Magnum Import Co., Inc.* v. *Coty*, 262 U. S. 159.

II. The Court Should Not Grant a Writ of Certiorari to Review a Decision of the Circuit Court of Appeals, Which Is Rested Upon the Law of the State Where the Cause of Action Arose, and Where There Is No Claim that the Decision Is in Conflict With the Decisions of the Highest Court of That State, and Where There Is No Question of Public Importance or of General or Federal Law Involved.

The granting of the writ prayed for would only serve to give the defeated parties (petitioners) another hearing in cases decided under the law of Virginia, as applied by the Supreme Court of Appeals of that State. Petitioners do not contend that the decision of the Circuit Court of Appeals is in conflict with applicable local decisions, and there is no question of public importance or of general or federal law involved. There is nothing in the proceedings below that calls for the exercise of this Court's power to review the decisions of the District Court and Circuit Court of Appeals. *Ruhlin, et al.,* v. *New York Life Ins. Co.,* 304 U. S. 202. The lower Courts have correctly applied the law of Virginia where the injuries complained of occurred; therefore, their findings should not be disturbed. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Palmer, et al., Trustees* v. *Hoffman Admr.,* 318 U. S. 109. In the *Palmer* case it is said:

> "Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error."

No such showing is made in the instant cases. On the contrary, the Virginia cases cited and relied upon in the opinion of the Circuit Court of Appeals and herein show that the applicable law of Virginia, as construed by the highest Court of that State, was applied.

We respectfully submit that the petition for a writ of certiorari should be denied.

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